SUPREME COURT, U. S.

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in the

Supreme Court

of the

United States

OCTOBER TERM 1973

No. 73-853

SUSAN JILL FORBICETTA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION

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Respondent in his memorandum in opposition sets forth a line of cases involving a "border search" and/or a search incident to a lawful arrest, however, such is not the case here, as the instant case involves, pure and simple, the infinitely greater indignity of a "strip search" at the

border. Therefore, it becomes necessary to distinguish respondent's lines of cases from the facts in the instant case. In an effort to clearly and concisely set forth these distinguishing facts, the following is respectfully submitted.

1. Respondent cites *Carroll v. United States*, 267 U.S. 132, 154 (1925)

A. Facts:

1. Involved a domestic search of an automobile and subsequent seizure of contraband whiskey and gin.

2. The stopping and searching of the automobile was predicated on personal knowledge of government agents that the defendants were engaged in illegal transportation of contraband, and that the automobile stopped and searched was the same automobile used by these same defendants on a previous occasion while engaging in this illegal activity.

B. Conclusion:

1. The Supreme Court upheld the search and seizure as proper as there was probable cause.

C. Facts as they relate to instant case:

1. There can be no reasonable correlation between the facts in *Carroll, supra,* and the instant case for the following reasons:

a. *Carroll, supra,* involved a domestic search of a possession, a car, and was based on previous personal knowledge of the government agent — conversely the instant case involving the infinately greater indignity of the strip search of the person and without previous personal knowledge of the agents.

b. *Carroll, supra,* — the stopping and searching of the automobile was predicated on the agent's personal knowledge about and directed to this specific defendant and this specific automobile — Conversely the instant case reveals no such showing of facts directed specifically to this defendant. Indeed, the record clearly shows, the absence of any subjective articulable facts directed specifically to this defendant. The record reveals only vague generalizations which can be reasonably attached to a very large body of our citizenry.

2. Respondent, cites *Boyd vs. United States,* 116 U.S. 616, 623 (1886).

A. Facts:

1. Defendants, by district court order were required to produce certain documents relating to quantity and value of certain cases of plate glass.

2. Defendants contend this violated the fourth amendment against unreasonable search and seizure and the fifth amendment prohibiting the compelling of a defendant to be a witness against himself.

B. Conclusion:

1. The Supreme Court reversed and remanded this cause for a new trial, on the basis of the fourth and fifth amendments and held, inter alia, that all searches and seizures are not abolished by the fourth amendment, only unreasonable search and seizures are forbidden.

C. Facts as they relate to instant case:

1. There can be no correlation of the facts in Boyd, supra, and the facts in the instant case, since no strip search was involved. There is, however, a setting out by reaffirmation, the principle that all searches and seizures are not abolished by the fourth amendment, only unreasonable search and seizure, therefore, it becomes necessary to dwell on the unreasonableness of the "strip search" in the instant case.

a. Respondent contends that the strip search of the defendants person in the instant case falls within a border search and is, therefore, not governed by the usual fourth amendment standard of "probable cause". Conversely, it is difficult to see how respondent, in view of the recent district courts of appeals decisions involving strip searches can arrive at this conclusion. *Henderson v. United States,* 390 F.2d 805, 808 (1967); *United States v. Guadalupe-Garza,* 421 F.2d 876 (1970); *United States v. Johnson,* 425 F.2d 630 (1970); rehearing denied June 22, 1970, Certiorari Granted, 91 S.Ct.

2294, Certiorari dismissed, 92 S.Ct. 38; *United States v. Shields*, 453 F.2d 1235 (1972); *United States v. Gilda-Avila*, 468 F.2d 184 (1972) and *United States v. Williams*, 459 F.2d 44 (1972). Furthermore, a possible border search of effects and/or automobile of one seeking entry into this country is a well established pre-requisite to entry. However, nothing leads a person to anticipate that upon reaching our border, he will be singled out, removed to a private examination room, ordered to disrobe and suffer the outlandish indignity of a strip search. As the Court in *United States v. Guadalupe-Garza*, 421 F.2d 876 (1970) in touching on this subject stated

> ". . . no one should be subjected to the indignity of such a search unless there are compelling reasons to do so."

3. Respondent cites, *United States v. McDaniel*, 463 F.2d 129, 132, (1972).

A. Facts:

1. Defendant was stopped and his car searched for aliens some seven miles north of Laredo, Texas. Border patrol agents had decided, prior to this search, to search every vehicle passing the border that night for aliens. Incident to the search for aliens, upon defendant opening the trunk of his automobile, agents spotted four large burlap bags covered with a Guadalajara, Mexico, newspaper. Defendant in response to agents question, stated

that the bags contained alfalfa. Upon further request by agent, defendant opened the bags, agent felt and smelled what appeared to him to be marijuana. Subsequently, defendant was arrested, tried and convicted for violation of narcotic laws.

B. Conclusion:

The United States Circuit Court of Appeals, in affirming the judgment of the District Court concluded that the search of the vehicle was legally proper in that, inter alia, the car was reasonably stopped pursuant to an authorized border search for aliens and the agents are empowered to conduct such search of the car, including, the trunk, for aliens entering the country illegally. The discovery of the contraband marijuana was incident to the authorized border search of a vehicle.

C. Facts as they relate to instant case:

1. There is no correlation in the facts of the McDaniel case, supra, and the instant case for the following reasons:

a. McDaniel, supra, is pure and simple, a border search of a vehicle for aliens attempting to enter the country illegally. Incident to the vehicle search, contraband marijuana was discovered. Conversely, the instant case involves the singling out of one person, and the removing that person to a private examination room to suffer the indignity of disrobing and "strip search".

4. Respondent cites, *Murgia v. United States,* 285 F.2d 14 (1960)

A. Facts:

Defendant Murgia upon entering the United States from Mexico on foot, registered as a narcotics addict, a fact well known to customs agents at this point of entry, and without being subjected to a border search was permitted to enter. A customs agent followed defendant on foot approximately four blocks, whereupon defendant was observed entering a car which contained three other persons, one of which was known to the customs agent as a convicted narcotics violator. The observing customs agent was then picked up by another customs agent in a government car and they together followed the car in which defendant had entered. The officers followed the car through the city of Calexico and approximately one to one and one-half miles outside the city, at which point they sounded the siren on the government vehicle. The siren was still being sounded when an arm extended from the right side of defendants car and an object was thrown out of the car. Defendants car stopped and all occupants were lined up and searched for weapons. One officer retrieved the object thrown from defendants car. This object proved to be a narcotic addicts kit. All four occupants of defendants car were placed under arrest, returned to the customs house and interrogated independently. One, Mr. Lilly, confessed and implicated the other three defend-

ants. Lilly further informed agents that defendant Murgia presently had narcotics concealed in his rectum. Subsequent examination by a doctor at the El Centro County hospital revealed that defendant did have narcotics in his rectum as stated by Lilly.

B. Conclusion:

This case involves a "border search" which resulted in the arrest of four defendants. Subsequent to the lawful arrest and interrogation of defendants, defendant Murgia, based upon information supplied by his then codefendant, was further searched and narcotics were found in his rectum. Murgia's "strip search" was incident to a lawful arrest and based further on information supplied by his then codefendant.

C. Facts as they relate to instant case:

1. There can be no correlation of the Murgia case, supra, to the instant case for the following reasons:

a. In Murgia, supra, the initial stopping of defendants automobile was for a "border search". Incidents occurring during the stopping of the automobile resulted in the arrest of defendant. Save for a search for weapons, no search of the defendants was made prior to arrest, and therefore all searches were conducted as incident to said arrest. Conversely, in the instant case the search was not

incident to a lawful arrest nor was there information supplied by a codefendant.

5. Respondent cites, *Landau v. United States* Attorney, 82 F.2d 286 (1936)

A. Facts:

In this case, the defendant's personal effects were subjected to a thorough border search while reentering the country. The search was conducted, based upon confidential information to customs officials, that defendant was involved in an attempt to smuggle swiss watch movements into the country. While in the process of being transported to a customs house defendant removed a memorandum from his brief case and put it in his pocket. The customs agent took the memorandum from him and found it contained a list, in the defendant's handwriting, showing the watch movements to be smuggled into the country.

B. Conclusion:

The Circuit Court of Appeals, Second Circuit, found that this was a lawful seizure of the subject memorandum as said memorandum was an instrumentality of crime.

C. Facts as they relate to instant case:

There can be no correlation in the facts of the Landau case, supra, and the instant case in that:

1. Landau, supra, was a "border search" of defendants baggage and was principally initiated by information supplied by a confidential informer that defendant was involved in an attempt to smuggle goods into the country. Conversely, in the instant case, we find not a "border search" of personal effects based on previous confidential information but a strip search without previous confidential information.

The foregoing cases have nothing whatever to do with the singling out of a person crossing our international border and subjecting that person to a "strip search". The standards necessary to subject a person to this infinitely greater indignity of "strip search" at an international border has been set forth by the Ninth Circuit Court of Appeals, a Circuit which has heretofore heard and decided more cases of this subject than any other Circuit Court of Appeals. See *Henderson v. United States*, 390 F.2d 805, 808 (1967); *Murgia v. United States*, 285 F.2d 14 (1960); *United States v. Guadalupe-Garza*, 421 F.2d 876 (1970); *United States v. Johnson*, 425 F.2d 630 (1970), rehearing denied June 22, 1970, Certiorari granted 91 S.Ct. 2294, Certiorari dismissed 92 S.Ct. 38, *United States v. Shields*, 453 F.2d 1235 (1972); *United States v. Gilda-Avila*, 468 F.2d 184 (1972) and *United States v. Williams*, 459 F.2d 44 (1972).

In *United States v. Johnson*, supra, "a case on all fours", the United States Circuit Court of Appeals, Ninth Circuit, in dealing with the subject of a border "strip search" reversed the findings of the Trial Court which

denied Defendant's Motion to Suppress. The facts of the Johnson case, supra, are as follows:

> "The prosecution called two witnesses at the hearing on defendant's motion to suppress. The first, Richard L. McCown, testified that he was a customs inspector stationed at San Ysidro, California, that he had considerable experience in examining persons crossing the border for narcotics, and that on August 18, 1968, he had observed defendant and a female companion entering the United States by foot, had talked with them, and had then requested a female Customs agent to search defendant. Government counsel then asked, "Were you suspicious before you made that request?"; and Inspector McCown replied, "I was, yes, sir."
>
> The prosecution's second witness was Netta W. Lohman, a part-time Customs inspectress. She testified that she had conducted the strip search of defendant and had found the heroin in question hidden in defendant's panties. No further testimony was presented.
>
> The trial judge dismissed defendant's motion, stating, "I cannot see where one can differentiate between the various degrees of suspicion, if an experienced police officer of some twenty-seven years of experience as Mr. McCown has, suspects enough to request a female Customs agent to search it seems to me is is a real suspicion."

The facts of the instant case reveal that Susan Forbicetta arrived at the Miami International Airport on a flight from Bogota, Columbia. Customs officer Hicks testified she was apparently traveling alone, had one suitcase, had no liquor, was wearing a loose-fitting dress and when she bent over you couldn't really see her figure. Hicks questioned her and she said she had been in Bogota, Columbia, for about ten days on vacation to see a friend, but had no relatives there, and that she was an unemployed bank teller. The Defendant was then singled out and removed to a private examination room for a private examination. She was subjected to a strip search and Cocaine was found in her girdle. Officer Hicks testified that he was employed as a customs patrol officer for approximately one year and three months.

The foregoing facts are generalizations, common to many persons crossing our international borders and are not articulable facts directed specifically to this Defendant which would lead an experienced prudent customs official to suspect that she was carrying contraband on her person, and as such, fails to meet the standard of "real suspicion" as required by the Ninth Circuit Court of Appeals.

In *United States v. Johnson,* supra, the Court said:

> "In Henderson v. United States, 390 F.2d 805, 808 (9th Cir. 1967), we held that the forced disrobing of a person entering the country violated the Fourth Amendment unless there was "at least a real suspicion, directed specifically to that person."

In Guadalupe-Garza, Judge Hufstedler wrote:

"[N]either *Henderson* nor our decisions following it have further defined the 'real suspicion' test stated there. We do so now.

'Real suspicion' justifying the initiation of a strip search is subjective suspicion supported by objective, articulable facts that would reasonably lead an experienced, prudent customs official to suspect that a particular person seeking to cross our border is concealing something on his body for the purpose of transporting it into the United States contrary to law.

The objective, articulable facts must bear some reasonable realtionship to suspicion that something is concealed on the body of the person to be searched; otherwise, the scope of the search is not related to the justification for its initiation, as it must be to meet the reasonableness standard of the Fourth Amendment. (Cf. Terry v. Ohio, supra, 392 U.S. 1 at 29, 88 S.Ct. 1868, 20 L.Ed.2d 889; Warden Md. Penitentiary v. Hayden (1967) 387 U.S. 294, 310, 87 S.Ct. 1642, 18 L.Ed.2d 782 (Mr. Justice Fortas, concurring).)" 421 F.2d at 879.

[2, 3] There are no "objective, articulable facts" in the record to support Inspector McCown's sus-

> picion. "If such facts existed, it was incumbent upon the government to prove them.[2]"
>
> And, of course, the discovery of contraband in defendant's underclothing does not validate the search. United States v. Di Re, 332 U.S. 581, 595, 68 S.Ct. 222, 92 L.Ed. 210 (1948)."

The Circuit Court of Appeals, Fifth Circuit, in their affirming opinion in the instant case, completely and totally disregarded the foregoing line of cases.

Furthermore, the Fifth Circuit in their affirming opinion, refers to something called a "smuggling profile". As authority for this, that Court, cited anti-skyjack cases, involving domestic baggage searches and airport security, wherein an "anti-skyjack profile" was mentioned. This is in direct conflict with the standard as established by the line of cases from the Ninth Circuit.

Respondent in its memorandum in opposition to Petitioners' Petition for Writ of Certiorari set out bald generalizations of customs patrol officer Hicks which they would have this Court believe has met the test of "real suspicion" as established by the Ninth Circuit. This simply is not true. These bald generalizations are simply that,

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[2]United States v. Jeffers, 342 U.S. 48, 51, 72 S.Ct. 93, 96 L.Ed. 59 (1951); McDonald v. United States, 335 U.S. 451, 456, 69 S.Ct. 191, 93 L.Ed. 153 (1948); Cohen v. Norris, 300 F.2d 24, 32 (9th Cir. 1962); Cervantes v. United States, 278 F.2d 350, 353 (9th Cir. 1960); Wrightson v. United States, 95 U.S.App. D.C. 390, 222 F.2d 556, 558 (1955); 3 Wright, Federal Practice & Procedure § 675, at 126-27 (1969 ed); *see also* Bumper v. North Carolina, 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968); United States v. Vickers, 387 F.2d 703, 106 (4th Cir. 1967).

"Generalizations". True, they may have aroused the curiosity of customs patrol officer Hicks. (T 36, 37 & 40). However, curiosity is not enough and can hardly be said to even remotely comply with the test of "real suspicion" as set forth in *United States v. Johnson*, Supra.

Nowhere, does the record reveal any showing of "real suspicion" supported by subjective, articulable fact directed to this specific person. Nowhere, has the government met the requirement, and if such facts existed, it was incumbent upon the government to prove them. Certainly the generalizations set forth that aroused the curiosity of custom patrol officer Hicks fail to meet this requirement in every regard, for as he himself states, his state of mind was simply curiosity. (T 36, 37, 40).

Reply to Number 2 of Respondent's Memorandum

In reply to Number 2 of Respondent's Memorandum, regarding the pretrial stipulation agreement (plea bargain agreement), the following is respectfully submitted.

There can be no question as to the existence of such agreement, as it was in writing and has now been lodged with the Clerk of this Court.

At the time of sentencing a different prosecutor appeared and did not honor the agreement but remained silent while the sentence was being imposed, instead of making the agreed recommendations. When Defense Counsel tried to proffer the agreement to the Court, the new prosecutor made the erroneous statement that:

> "Mr. Boswell: Yes, sir. What I wanted to say is that it was my understanding about this was that this was if there were a guilty plea." (T-122)

The truth of the matter is, that the government made a promise to recommend a $2,500 surety bond pending appeal and sentence of two years. The government did not keep their promise and made the aforesaid erroneous statement.

The government has now admitted, in the memorandum in opposition filed by the Solicitor General (at page 6) that this was an erroneous statement.

In *Santobello v. New York,* 404 U.S. 257, The Supreme Court of the United States granted Certiorari to determine whether the State's failure to keep a commit-

ment concerning the sentence recommendation on a guilty plea required a new trial. The Supreme Court, at page 257,

> "Held: The interest of justice and proper recognition of the prosecution's duties in relation to promises made in connection with 'plea bargaining' require that the judgment be vacated . . ."

In the *Santobello* case, as in the case at bar, a different prosecutor appeared at sentencing and failed to honor the agreement. The Court went on to say, at page 262,

> "The staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right is doing' or has done."

At page 266, the Court in citing other cases, said:

> "The lower courts, however, have uniformly held that a prisoner is entitled to some form of relief when he shows that the prosecutor reneged on his sentencing agreement made in connection with a plea bargain, most jurisdictions preferring vacation of the plea on the ground of involuntariness, . . . As one author has stated, the basis for outright vacation is 'an outraged sense of fairness when a prosecutor breaches his promise in connection with sentencing'."

At page 267, the Court went on to say,

> "Where the 'plea bargain' is not kept by the prosecutor, *the sentence must be vacated . . .*" (Emphasis added)

Based on the promises or inducements of the prosecutor the defenses gave up their constitutional right to trial by jury; agreed to stipulate that evidence was cocaine so that agent (chemist) would not have to travel from Georgia and that the testimony of the Motion to Suppress would be adopted at the time of trial. All of the above was honored by the defense, but breached by the prosecution and just like *Santobello,* supra, this was a clear case of a broken promise — of the very condition on which the agreement was obtained.[1]

[1]Since the government, in their memorandum in Opposition (at page 6) makes reference to the affirming Opinion of the Court of Appeals, Petitioner feels it is appropriate to mention that the Court of Appeals, in their affirming, did not address themselves to the question presented regarding the pre-trial agreement, although argument and law (Santobello) was presented.

Their opinion made no reference whatsoever to the breach of the pre-trial stipulation.

Reply to Number 3 of Respondent's Memorandum

In reply to Number 3 of Respondent's Memorandum, regarding unfair trial, the following is respectfully submitted.

One of the basic fundamental principles set forth in the Constitution of the United States is that all persons shall be provided with due process of law, and as such, shall be entitled to a fair and impartial trial before a fair and impartial judge.

In *Knapp v. Kinsey*, 232 F.2d 458 (1956), the United States Court of Appeals, Sixth Circuit, in a detailed and very learned opinion, among other things, stated:

> "One of the fundamental rights of a litigant under our judicial system is that he is entitled to a fair trial in a fair tribunal, and that fairness requires the absence of actual bias or prejudice in the trial of the case. . . . *If this basic principle is violated, the judgment must be reversed.*" (Emphasis added)

In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942, the Court stated:

> *"A fair trial in a fair tribunal is a basic requirement of due process."* (Emphasis added)

In the instant case, the facts, as shown by the record, reveals that the defendant did not receive a fair and impartial trial by a fair and impartial Judge. In reviewing the record during defendants' Motion to Suppress (R-144) it becomes abundantly clear that the trial judge did not

conduct the proceedings in a fair and impartial manner so as to afford the defendant due process of law. During the proceedings when counsel would attempt to bring good and substantial law to the attention of the Court, the trial judge, in displaying hostility, would belittle, unnerve, badger, accuse and threaten defense counsel to the point of denying defendant representation or due process of law and further threatened the defendant, who was under oath, with perjury charges, if she did not tell the truth.

To indisputably establish the foregoing, one need only examine the transcript (T-1 through 124) and more specifically that part wherein the Court in cross examining the defendant during Motion to Suppress (T-12, 13) where the following exchange with defense counsel transpired:

> "The Court: I think she was paid. You know the mule deal? You are familiar with that?"
>
> "Mr. Freed: I am familiar with what you are trying to get at, your Honor."
>
> "The Court: Then I want to get at it and I want her to tell the truth, otherwise she will be subject to perjury charges."
>
> "Mr. Freed: Yes, I understand all of that, but this is a Motion to Suppress, and I believe the issue here is whether or not . . ."
>
> "The Court: I am suppressing you now, because you are aiding and abetting in narcotics trade."

"Mr. Freed: No, I am not. I do not feel that way."

"The Court: I think so, because you are concealing facts."

"Mr. Freed: I am not concealing facts, your Honor."

"The Court: Well, you are."

"Mr. Freed: No sir."

"The Court: Well, we will look into it in your case, then, if that is the circumstance."

"Mr. Freed: Yes, your Honor."

The foregoing exchange occurring during the very early part of the hearing, before any government testimony was offered, clearly demonstrates the prejudicially biased attitude, and the open hostility of the trial judge in belittling, unnerving, badgering, accusing and threatening the defendants counsel. In the case of *Knapp v. Kinsey*, 232 F.2d 458 (1956) supra, the Circuit Court of Appeals, Sixth Circuit stated:

> *"In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942, the Supreme Court said 'Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.' In Whitaker v. McLean,

> 73 App. D.C. 259, 118 F.2d 596 the Court said — '*Hostility is a form of bias.* . . . The policy . . . is that the courts of the United States 'shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial'; i.e. shall appear to be impartial." (Emphasis added)

In the instant case we find a record that is replete with the trial courts prejudicially biased actions and statements toward the defendants counsel. The exchange between the Court and defense counsel hereinabove noted during the Motion to Suppress is but one instance, to continue, during the trial. The following exchange, again between the Court and defense Counsel transpired (T 103-107):

> "Mr. Freed: I would also like to object to the admissibility of the evidence on the basis that the search, and particularly the search of this defendant, was an unreasonable search in violation of the Fourth Amendment of the U.S. Constitution. Mr. Hicks testified previously that he could not make out — In fact, you recall his testimony, your Honor."
>
> "The Court: She had a loose dress on and no bumps appeared as bumps under the dress."
>
> "Mr. Freed: Right, and he named a few things, the fact that she was single, and the fact that she was going to Bogata, but that it made him curious.
>
> I submit under the law, curiosity is not enough.

The cases, even of the Fifth District cases and in particular the Ninth District cases have laid down certain reasonableness tests."

"The Court: We have discussed that before and I have ruled."

"Mr. Freed: I do not feel the form of strip search that the Government made has met the burden."

"The Court: There have been thousands that did find something."

"Mr. Freed: There certainly should be a standard, more than curiosity."

"The Court: I do not think the United States has gone out of business yet. They are pretty near out of business because of the silly rules of some courts, but I do not follow those rules."

"Mr. Freed: I have nothing further, your Honor."

"The Court: By the way, there was a test search, you remember.

An agent made a search before he removed that stuff."

"Mr. Freed: That was after the search."

"The Court: I say, there is no substantial decision to indicate that search was wrong."

"Mr. Freed: There are seizures —

"The Court: Ridiculous decisions, but that is not unusual."

"Mr. Freed: There are decisions that are available for the Court."

"The Court: They sustain it."

This was certainly reasonable. Here is a woman going some place without any business down there, without any money."

"Mr. Freed: Who is to determine what she can do and what she cannot do?"

"The Court: Here is this woman going to a country without a job, without acquaintances, without anything and going through a procedure that is followed by hundreds of narcotic peddlers. And if the customs did not do that search reasonably as they did in this case, they would be terribly neglect. We could get rid of them and save some money."

"Mr. Freed: I understand your Honor's views and I respect them, but I submit under case law it has not met the reasonable test."

"The Court: Then you expect the Government to go to pieces."

"Mr. Ullman: Your Honor, will Government's Exhibit 1 be received in evidence?"

"The Court: Be Received."

"Mr. Ullman: The one last thing before the Government rests is counsel for the defense as stipulated that the contents of each of the seven bags was submitted for a chemical analysis to the U.S. chemist in Savannah, Georgia and they determined the contents of each said bags to be cocaine fifty percent pure.

"The Court: Is that right, counsel?"

"Mr. Freed: I agreed. I would agree to that so that they would not have to come down from Georgia; that it is cocaine."

"Mr. Ullman: Your Honor, the Government rests."

"The Court: Do you have anything?"

"Mr. Freed: Yes, your Honor.

At this time, I would like to move for a directed verdict."

"The Court: Be denied on the same grounds."

During the sentencing the following exchange transpired: (T 118-119).

"Mr. Freed: Your Honor, I would like the record to reflect that prior to waiving the jury trial, the defense attorney and the United States Government entered into an agreement where —

"The Court: I told you and you do not lie here in front of me or you will get held in contempt."

"Mr. Freed: I am not lying in front of you."

"The Court: Well, you are lying just as sure as you are standing there."

"Mr. Freed: I am just telling you that the United States Government —

"The Court: You made an agreement and I have told you three times, no agreement in this Court."

"Mr. Freed: I do not believe you told me three times. I just wanted you to be aware that they said they would recommend —

"The Court: All right. A hundred-dollar fine for you. You are, in my opinion, a liar and unfit to practice law here.

Further, during the same proceedings (T 121-122), the following exchange occurred between the Assistant United States Attorney, the Court and defense counsel:

"Mr. Boswell: Your Honor, I would like the record to reflect that it is my understanding in discussing this with the United States Attorney who

is in charge of this case that such an agreement as Mr. Freed referred to was —

"The Court: Well, you have no business making special agreements because I do not recognize them."

"Mr. Boswell: I understand, Judge Choate. I wanted to say that I understood —

"The Court: But he just quoted you as making a special agreement just now."

"Mr. Boswell: Yes, sir. What I wanted to say is that it was my understanding about this was that this was if there was a guilty plea."

"The Court: Well, he did not say that. You heard him."

"Mr Freed: That is not true. I would like the record to reflect that we waived a jury trial and the Government said they would recommend, recommend $2,500 . . ."

"The Court: Now you have changed your story a little bit."

"Mr. Freed: I have not changed it. I have it in writing, your Honor. It says here, 'I will recommend . . .' It is signed by the U.S. Attorney, '. . . a $2,500 surety bond pending the appeal.' "

Mr. Ullman, the Government prosecutor utilized the stipulation to waive jury and adopt testimony from Motion to Suppress (T 67, 71, 72 and 106).

Mr. Ullman stated (T-67)

> "Mr. Ullman: We had the hearing on the Motion to Suppress the other day and your Honor denied the Motion. Counsel now wishes to proceed to trial and waives jury and proceeds non-jury and to adopt the testimony the Government offered recently at the hearing on the Motion to Suppress. The Government will have one additional matter of evidence to present."

Mr. Ullman stated (T 71-72)

> "Mr. Ullman: Your Honor, *pursuant to a stipulation* between Mr. Freed and myself, an agreement between Mr. Freed and myself, The Government now moves for the introduction of all that testimony which the Government elicited during the hearings on the Motion to Suppress recently held before your Honor." (Emphasis added)

Mr. Ullman mentioned the above stipulation and used it to introduce certain testimony and used it again (T 106-107) when he mentioned the stipulation again to introduce contraband without chemist, per the stipulation.

The stipulation that was mentioned and used by Mr. Ullman during the trial was not honored by the Govern-

ment at the time of sentencing. A different Government Prosecutor appeared and said, (T-121)

> "Mr. Boswell: Your Honor, I would like the record to reflect that it is my understanding *in discussing this with the United States Attorney who is in charge of this case* that such an agreement as Mr. Freed referred to was..." (Emphasis added)

Mr. Boswell stated (T-122)

> "Mr. Boswell: Yes Sir. What I wanted to say is that it was my understanding about this was *that this was if there were a guilty plea.*" (Emphasis added)

The above mentioned stipulation was utilized by the Government, but not honored by the Government. When defense counsel tried to appraise the Court of the Stipulation Agreement, the Court held defense counsel in contempt, fined him one hundred ($100.00) Dollars, called him a liar and said he was unfit to practice law here, (T-118, 119, 120, 121 and 122) among other things.

Certainly the foregoing record, argument and law, leaves no question as to a separate issue of "unfair trial" and the fact that the Respondent stated in the memorandum at page six, referring to the question of the reasonableness of the custom search, said

> "As that issue was unquestionably resolved in a proper manner, any personal animus towards the

attorney could not have been prejudicial to petitioner."

That statement simply is not true.

It is respectfully submitted that the Writ of Certiorari should be granted.

Respectfully submitted,

/s/ Jack Freed

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CERTIFICATE OF SERVICE

I, JACK FREED, attorney for Petitioner, hereby certify that I have this 2nd day of May 1974, served by Air Mail three printed copies of the foregoing Reply to Memorandum in Opposition to the United States Court of Appeals for the Fifth Circuit; three printed copies to the Solicitor General, Department of Justice, Washington, D.C. 20530 and three printed copies, by regular mail to Robert Rust, United States Attorney for the Southern District of Florida, at 14 N.E. 1st Avenue, Suite 300 Ainsley Building, Miami, Florida, 33132.

/s/ Jack Freed

JACK FREED